



RESEARCH ARTICLE

AN ANALYSIS OF LAW ONSEXUAL HARASSMENT OF WOMEN AT WORK PLACE : A NOTION OF GENDER EQUALITY AND JUSTICE

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ABSTRACT

We know our Constitution ensures equality of position and opportunity for men and women in the workplace. However, after so many years of freedom and in the twenty-first century, we have failed ensure equality to women. The position of working women who walked outdoors to seek some economic independence is not ideal even now, and they are susceptible to many sorts of harassment, including sexual harassment. Because female subordinates are weaker in the workplace, male superiors see this as a chance to exploit them and make them depressed. Workplace sexual harassment is a difficult issue, and the harassers may not be aware of their actions. Sexual harassment can take the form of physical touch or verbal abuse. These threats, offers, and promises can occur both on and off the job, during business trips, social functions, and other work-related activities.

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INTRODUCTION

We know our Constitution guarantees equality of status and equal opportunity in the economic field for both men and women. But truly speaking after so many years of independence and in this twenty first century we have miserably failed in placing the women in an equal position. Violence and offences against women are increasing day by day and the position of working women who ventured to step outside for seeking some sort of economic independence is not that good even today and they are subject to various types of harassment particularly sexual harassment. Only because they are relatively in a weaker position in their place of employment the male superiors find this an opportunity to exploit the female subordinate thereby putting them psychologically in a depressed condition. Sexual harassment is a complex problem in the world of work, the harassers may not know that they are harassing. Sometimes, well intended gestures or remarks of friendship and affection may also be received as harassment. Sexual harassment can occur by physical contact or mere words. It can be in the form of threat, an offer or a promise, it may even take place away from the immediate work setting or during business trips, work oriented social events as well as on the job.

Definition of the term: According to *Somers and Clementson Mohr*, "sexual harassment may include verbal abuse, sexist remarks regarding a women's clothing or body patting, or brushing up against a woman's body, leering or ogling, demand for sexual favours in

return for hiring, promotion or tenure, physical assault, rape".¹ Further *Catharine Mackinnon* defines "sexual harassment as "unwanted imposition of sexual requirement in the context of relationship of unequal powers".² Likewise *Kathleen Gallivan* defines "sexual harassment as any type of unwanted sexual or gender oriented behaviour that has adverse job related affects".³

General Definition: When anybody falls in love and it is backed by sexual desire of both the sides it will not amount to sexual harassment but when there is sexual desire or urge by one side and the other side is hesitant towards it, we can term such a situation as sexual offence. In the absence of any specific law prior to the Enactment of Prevention of Sexual Harassment(Prevention, Prohibition and Redressal) Act, 2013 on sexual harassment at workplace the apex court came forward in its landmark judgment to define sexual harassment in the following words.

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

¹ Patricia A. Somers and Judith Clementson- Mohr: "Sexual Extortion in Work Place the Personal Administrator" 1979, at p-23.

² Catherine Mackinnon, "Sexual Harassment of Working Women" New Have, Yale University Press, 1979, at p-32.

³ Kathleen Gallivan, "Sexual Harassment after Janzonv. Play" The Transformation Possibilities, Toronto Factory Law Review, at p-27.

- Physical contact and advances;
- A demand or request for sexual favours;
- Sexually coloured remarks;
- Showing pornography;
- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Any act or gesture whether directly or by implication, aims at or has a tendency to outrage to modesty of a female employee must fall under the general meaning of sexual harassment.⁴ Someone who is in position to dispense favour to a woman especially if she is in a subordinate or a powerless position is known as sexual harassment. Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary whether in Government, public private enterprise, such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instances when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.⁵ Further the Supreme Court in *Apparel Export Promotion Council v. A.K. Chopra's case* went on to observe: "An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her".

Types of Sexual Harassment

Quid Pro Quo Harassment: It means sexual demands accompanied by the threat of adverse job consequences if the demands are refused. 'quid pro quo' means 'this for that' or 'something for something'. It indicates a mutual exchange of something (money, goods, favour) between two parties. This form of sexual harassment will often be exploited by a woman's superior at the workplace – someone with control over her standing as an employee. The superior will ask for, or demand, sexual indulgences and will promise promotions, pay raises, and general job security in return. Should the victim choose not to consent to that deal, she may suffer job loss, demotion, or transfer.⁶

To establish a prima facie case of quid pro quo sexual harassment, a plaintiff must show that;

- The employee belongs to a protected class;
- The employer subjected the employee to unwelcome conduct in the form of
- Sexual advances or requests for sexual favours;
- The harassment was based upon sex; and
- The employee's acceptance or rejection of the harassment was an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment.

If a plaintiff in a sexual harassment case is able to establish each of the above elements, then the burden to prove otherwise shifts to the employer.

If the employer is able to provide a legitimate reason for its actions, the employee must then establish that the reasons provided by the employer are not the real reasons for the employment decision and are merely a pretext for unlawful discrimination.⁷ In *Burlington v. Ellerth*⁸, it is not necessary in an allegation of 'quid pro quo' harassment for the threat of adverse employment action to have been carried out. It is sufficient for the complainant to prove that such a threat was made.

Hostile Environment Harassment: Hostile work environment has been defined as "unwanted conduct of sexual nature that have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment". It has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment. Sometimes, the employee is subjected to persistent requests for sexual favours and is persistently refused. Although such refusal does not cause any loss in job benefits, the very persistence of the demands creates an offensive work environment, which the employee should not be compelled to endure. Thus, sexual harassment can manifest itself both physically and psychologically. All working women regardless of their age physical appearance, social status, job security may encounter sexual harassment. However, women working at the bottom of the economic scale are subject to more gross expression of sexual harassment. They often encounter crude suggestive comments and physical assaults. Professionals and managerial women, on the other hand, receive more subtle treatment. Instead of the outright physical abuse, they are subject to psychological intimidation.⁹ Sexual harassment also occurs when an individual experiences unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature where such conduct has the purpose or effect of unreasonably interfering with that individual's work performance or creating an intimidating, hostile, or offensive working environment. To establish a prima facie case of sexual harassment based on hostile work environment, a plaintiff must show that:

- The plaintiff belongs to a protected class;
- The plaintiff was subjected to unwelcome sexual harassment;
- The harassment was based on sex;
- The harassment affected a term, condition, or privilege of employment; and
- The employer knew or should have known the conduct was occurring;

The United Nations and other International Organizations have all recognized that women's rights are human rights, and that violence against women is a violation of the human rights of women. These organizations have specifically condemned sexual harassment in a series of international instruments as a prohibited form of violence against women. As sexual harassment violates the right to just and favourable conditions of work, this fact has been recognized by the United Nations in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In addition, a government's failure to provide an effective remedy to the victims of sexual harassment violates the right to an effective remedy for the violation of fundamental human rights guaranteed by the International covenant on Civil and Political Rights (ICCPR) and the UDHR. As such the United Nations has emphasized the responsibility of member states to create conditions that protect the human rights of individuals and in particular of women in public and private life, and has acknowledged that governments may be made responsible for

⁴NushatParaveen Khan, "Sexual Harassment at Work Place" Vol-14, New-Delhi, Legal News and Views, January 2000, p-23.

⁵Ranbir kaur, "Sexual Harassment of Working Women: The Legal Approach" Vol. XII Srinagar, Kashmir University law Review, 2005, at p-94.

⁶G. Manjunath Deputy Labour Commissioner "Law Relating to Prevention of Sexual Harassment at Workplace" Bangalore, National law School of Indian University, 2008, at p-3.

⁷"Sexual Harassment of Women at Workplace" New-Delhi National Human Rights Commission, Faidkot House, at p-2.

⁸(524 US 742, 1998).

⁹Pragya Awasthi "Sexual Harassment at Work Places" Legal News and Views, March 2007, at p-12.

inaction in the face of human rights abuses by private actors just as they are abuses committed by state actors. This express condemnation of human rights violations commonly experienced by women reflects a growing recognition in the international community that the traditional human rights work of international organizations and non-governmental organizations largely ignored the experiences of women by focusing mainly on violations of civil and political rights. Notwithstanding the serious limitations in these documents with respect to sexual harassment the strong international condemnation of sexual harassment may provide the necessary legitimacy to people at large working to adopt national legislations to prohibit sexual harassment in countries that have not yet addressed the problem.¹⁰ This occurs when an employee is subjected to comments of a sexual nature, unwelcome physical contact, or offensive sexual materials as a regular part of the work environment. For the most part, a single isolated incident will not be enough to prove hostile environment harassment unless it involves extremely outrageous and egregious conduct. The courts will try to decide whether the conduct is both 'serious' and 'frequent'. Supervisors, managers, co-workers and even customers can be responsible for creating a hostile environment. The line between 'quid pro quo' and 'hostile environment' harassment is not always clear and the two forms of harassment often occur together. For example, an employee's job conditions are affected when a sexually hostile work environment results in a constructive discharge. At the same time, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to retaliate against her if she does not comply.

"Hostile Environment" harassment may acquire characteristics of 'quid pro quo' harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct. Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of Section 704 (a) of Title VII have occurred.¹¹ In *Meritor Savings Bank v. Vinson*¹², the US Supreme Court undertook a detailed analysis of what constitutes 'hostile environment' sexual harassment. Sex-related misconduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment, whether or not it was directly linked to an economic quid pro quo, constituted sexual harassment. In *Apparel Export v. A.K. Chopra*¹³, case the Supreme Court relied on the statement in the relevant enquiry report that the perpetrator's conduct created an 'intimidating and hostile working environment'. The first successful claim against sexual harassment at the workplace is *Walker v. Northumberland County Council*¹⁴, where psychiatric damages were awarded by the English Court arising out of occupational stress. Thus it becomes clear that injury might include stress. In such a case an action may be against an employer for negligence. The judgment in this case is of great importance as it opens yet another area that is of mental harassment as distinguished from the physical contact theory. It is obvious that the violation of the female body perpetrated by acts of sexual harassment does not have to be at the level of harm to the physical body. The harm may be caused by a verbal insult and may occur at the mental level. Thus, the problem of sexual harassment at the workplace exists, causing injury to women, and it is crucial that a legal response is articulated and rigorously pursued. It is not surprising that women are deterred by the prospect of complaining about harassment. Once the law is remade so as to embody a female structural understanding of what gives rise to sexual harassment; to approximate women's experience of the injury it imposes; and to foreshadow a radical alternative set of relations between the sexes, its

traditional majesty could then be invoked in order to provide a revolutionary transformation.

Sexual Harassment of Woman at Work Place (Prevention, Prohibition and Redressal) Act, 2013 Object of the Act: *An Act to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. WHEREAS sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment; AND WHEREAS the protection against sexual harassment and the right to work with dignity are universally recognised human rights by international conventions and instruments such as Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified on the 25th June, 1993 by the Government of India; AND WHEREAS it is expedient to make provisions for giving effect to the said Convention for protection of women against sexual harassment at workplace.*

The Act will ensure that women are protected against sexual harassment at all the work places, be it in public or private. This will contribute to realisation of their right to gender equality, life and liberty and equality in working conditions everywhere. The sense of security at the workplace will improve women's participation in work, resulting in their economic empowerment and inclusive growth. The Act uses a definition of sexual harassment which was laid down by the Supreme Court of India in *Vishaka v. State of Rajasthan* (1997). Article 19 (1) g of the Indian Constitution affirms the right of all citizens to be employed in any profession of their choosing or to practice their own trade or business. *Vishaka v. State of Rajasthan* established that actions resulting in a violation of one's rights to 'Gender Equality' and 'Life and Liberty' are in fact a violation of the victim's fundamental right under Article 19 (1) g. The case ruling establishes that sexual harassment violates a woman's rights in the workplace and is thus not just a matter of personal injury. This case ruling had issued Vishaka guidelines under Article 32 of the Constitution of India. The Supreme Court had made it mandatory that these had to be followed by all originations until a legislative framework on the subject has been drawn-up and enacted.

Major features: The Act defines sexual harassment at the work place and creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges. The Act also covers concepts of 'quid pro quo harassment' and 'hostile work environment' as forms of sexual harassment if it occurs in connection with an act or behaviour of sexual harassment. The definition of "aggrieved woman", who will get protection under the Act is extremely wide to cover all women, irrespective of her age or employment status, whether in the organised or unorganised sectors, public or private and covers clients, customers and domestic workers as well.

- An employer has been defined as any person who is responsible for management, supervision, and control of the workplace and includes persons who formulate and administer policies of such an organisation under Section 2(g).
- While the "workplace" in the Vishaka Guidelines is confined to the traditional office set-up where there is a clear employer-employee relationship, the Act goes much further to include *organisations, department, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex and any place visited by the employee during the course of employment including the transportation. Even non-traditional workplaces which involve tele-commuting will get covered under this law.*
- The Committee is required to complete the inquiry within a time period of 90 days. On completion of the inquiry, the report will

¹⁰ Supra Note 14, at p-3.

¹¹ <http://en.vakilnol.org>. visited on 22-03-2009 at p-18.

¹² (477 US 57 (1986).

¹³ (1999) 1 SCC 759.

¹⁴ (1995) IRLR 35.

be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days.

- Every employer is required to constitute an *Internal Complaints Committee* at each office or branch with 10 or more employees. The District Officer is required to constitute a Local Complaints Committee at each district, and if required at the block level. The Complaints Committees have the powers of civil courts for gathering evidence.
- The Complaints Committees are required to provide for conciliation before initiating an inquiry, if requested by the complainant.
- The inquiry process under the Act should be confidential and the Act lays down a penalty of Rs 5000 on the person who has breached confidentiality.
- The Act requires employers to conduct education and sensitization programmes and develop policies against sexual harassment, among other obligations. The objective of Awareness Building can be achieved through Banners and Poster displayed in the premises, eLearning courses for the employees, managers and Internal Committee members, Classroom training sessions, Communication of Organizational Sexual Harassment Policy through emails, eLearning or Classroom Training. It is recommended that the eLearning or Classroom Training be delivered in the primary communication language of the employee.
- Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine of up to ₹ 50,000. Repeated violations may lead to higher penalties and cancellation of licence or deregistration to conduct business.
- Government can order an officer to inspect workplace and records related to sexual harassment in any organisation.
- Under the Act, which also covers students in schools and colleges as well as patients in hospitals, employers and local authorities will have to set up grievance committees to investigate all complaints. Employers who fail to comply will be punished with a fine of up to 50,000 rupees.

PROVISION UNDER INDIAN PENAL CODE

Sec. 354: Outraging Modesty of Women The law makes it a special crime to use force against a woman, or even threaten to use force, if the intention is to 'outrage her modesty'. It treats it more seriously than normal and criminal force by allowing the police to make arrests for such crimes without a warrant. The law *does not* explain what 'outraging modesty' means. Courts usually make this determination by looking at all circumstances surrounding the incident. The Supreme Court referred to 'modesty' as *feminine decency* and a virtue that women possess owing to their sex. The punishment is jail time of between one and five years along with a fine.

Example: Ramesh pulls on Nina's clothes while playing Holi and rips her T-shirt apart. It is a crime only if Ramesh intended or knew it to be likely that his acts would outrage Nina's modesty.

Sec. 354 A: Sexual Harassment, Sexual harassment is the: Unwelcome touching or other physical contact, asking or demanding sex or any other sexual activity, making remarks which are of a sexual nature, showing pornographic material which may include videos, magazines, books etc. The IPC makes it possible to file a criminal complaint if you have been sexually harassed, while the special law gives you the option of seeking civil remedies and damages, involving your office administration. The punishment for the first three kinds of sexual harassment is three years as compared to the fourth type (making sexually coloured remarks) which is one year.

CONCLUSION

It is quite pertinent from all these definitions that no specific or exact meaning can be assigned to the term harassment because it is a multitude problem having different facets and depending on the attitude of the person who suffers from it and the society in which she lives. An analysis of all these definitions show that it is a form of sex discrimination which working women are forced to face due to their vulnerability and hence the definition of the phrase sexual harassment can be broad and controversial depending on each individual's opinion of what harassment is, the study of enactment on the subject indicates the efforts of government to cope up with the problem which undermines the dignity of women. Through these provisions and guidelines it is aimed to ensure equality to women which is undeniable tenet of constitution.

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